Supreme Court, U.S.
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NO. 09-854

IN THE

Supreme Court of the United States

FORTIS INSURANCE CO.,

Petitioner,

v.

JEROME MITCHELL, JR.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where the jury was presented with and considered evidence of potential harm, plaintiff argued that potential harm should be considered in assessing punitive damages, defendant requested no limiting instruction, and the trial court used potential harm in reviewing the jury's punitive verdict, whether the South Carolina Supreme Court deprived petitioner of procedural due process by justifying a remitted punitive damage award on the basis of a *smaller* potential harm figure.

2. Whether a punitive damage award for egregious misconduct held to merit punitive damages at the "outer limits of the single-digit ratio" is unconstitutionally excessive.

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Jerome Mitchell, Jr., respectfully requests that this Court deny the petition for writ of certiorari that seeks review of the decision of the South Carolina Supreme Court in this case.

COUNTERSTATEMENT OF THE CASE

Petitioner Fortis Insurance Company portrays the facts of this case in a manner that disparages its underlying liability—liability not contested in any question presented—in order to obtain relief from punitive damages. The portrayal is at odds with the opinion of the South Carolina Supreme Court below and the order of the trial court, both of which support the jury's findings, findings that are not subject to reexamination in this Court. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 439-40 n.12 (2001).

A. The Facts as Described by the South Carolina Supreme Court in the Course of Remitting the Punitive Damages Award

Respondent Jerome Mitchell, Jr., was seventeen, college-bound, and no longer covered by his mother's policy when he applied for health insurance from Petitioner Fortis Insurance Company, in May 2001. Pet. App. 2a. The application asked: "Been diagnosed as having or been treated for any immune deficiency disorder by a member of the medical profession?" *Id.* Answering honestly, Mitchell said "no." *Id.* Fortis, after reviewing the application, issued him an insurance policy. *Id.*

About a year later, in April 2002, Mitchell tried to donate blood at the American Red Cross. Pet. App. 3a. On May 13, 2002, the Red Cross informed Mitchell that his blood had screened positive for HIV and suggested that he confirm their test results with his personal physician. Mitchell sought confirmation the next day, on May 14, 2002, when he visited Dr. Michael Chandler. *Id.* Dr. Chandler's tests confirmed Mitchell's HIV-positive status. An assistant to Dr. Chandler made the following notation on Mitchell's chart during the *May 14, 2002* visit: "Gave blood in March—got letter yesterday stating blood tested [positive for] HIV." *Id.* A handwritten note on the chart indicated, correctly, that Mitchell was eighteen years old, but erroneously misstated the year of the visit as May 14, 2001. *Id.*

Upon Dr. Chandler's referral, Mitchell subsequently visited Dr. Kevin Shea, an infectious disease specialist, on May 23, 2002. *Id.* Dr. Shea recorded Mitchell's medical history, as follows: "Mitchell is an 18 year old African-American male with no past medical history who apparently tried to donate blood in April of this year [and] was noted to be HIV positive." *Id.*

When Fortis received claims for Mitchell's treatment and testing from Drs. Chandler and Shea, it launched an investigation to determine whether Mitchell had failed to disclose a pre-existing condition on his policy application.[1] *Id.* Mitchell

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[1] The Fortis investigation was triggered by a computer program that identifies high-cost treatments, not because of "anything suspicious in the application or based upon any actions of the insured." Pet. App. 41a.

cooperated with the investigation, agreeing to release medical records and to identify his healthcare providers. Pet. App. 4a.

Focusing solely on an erroneously dated intake note, as her written summary made clear, Fortis Senior Underwriter Kate Stephens recommended that Mitchell's insurance policy be rescinded on the ground that he had misrepresented his HIV status at the time of his application. *Id.* An addendum to the referral summary, added shortly thereafter, likely by Stephens,[2] inquired openly about what rationale might best support rescission of Mitchell's health insurance policy, given the absence of clear evidence that Mitchell had made any misrepresentation about his prior health status: "Can't use the question re: AIDS as he does not have AIDS, he has tested positive for the HIV virus. This is the only question I've found that we can use—any other suggestions?" *Id.* The note added: "we do not have the results of the HIV test. This is the only entry in the medical records regarding HIV status. Is this sufficient?" *Id.* at 5a.

Testimony by Mitchell's insurance expert at trial established that it was Fortis's practice to shut down an investigation once a single piece of evidence was discovered that would support rescission. *Id.* at 6a-

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[2] The trial court noted that this document was "originally produced to Plaintiff's counsel in a completely illegible form." Pet. App. 40a. Repeated discovery requests only produced "marginally better copies." *Id.* When a "clear and legible" copy was finally produced, Fortis's employee stated it took her ten minutes or less to obtain from microfilm stored steps from her office. *Id.*

7a. An insurance expert called by Fortis conceded on cross-examination that an insurance company had a duty to investigate and find information that may lead to *payment* of a claim, *id.* at 7a, but Stephens' supervisor was unable to answer whether any employee had the responsibility for carrying out that responsibility of finding out the truth about a policyholder's medical condition. *Id.* Yet, an employee in Dr. Shea's office testified that it took her "five minutes" to verify the correct date on the erroneously dated intake form that prompted Fortis's rescission. *Id.* at 7a n.5.

Shortly thereafter, in the course of a two-hour meeting in which it reviewed 45 other rescission recommendations, Fortis's rescission committee voted to rescind Mitchell's policy, *id.* at 5a, on what "was likely no more than a three-minute review." *Id.* at 8a. The following day, Fortis sent Mitchell a letter informing him of his policy's rescission and welcom[ing] any information you may have which would effect [sic] our decision to rescind your policy." *Id.* Mitchell immediately contacted Fortis, insisting that he had not misrepresented his health status in his application and asked to speak to Stephens. He was instead directed to a customer service representative who answered that there was "nothing [the representative] could do" about the rescission. *Id.* at 5a. No information was provided to Mitchell about any right to appeal the rescission. *Id.* at 6a.

Suddenly without health insurance, Mitchell sought the help of a case manager at the Hope Health free medical clinic. That case manager, too, contacted Stephens to inform her that medical

records in the case manager's possession confirmed that Mitchell first tested HIV positive well after purchasing health insurance and offered to fax or mail records confirming the timing. Stephens, in response, refused to accept any records, stating "there was nothing she could do at this time." *Id.* at 5a-6a.

Mitchell retained an attorney who, on June 4, 2003, sent Fortis a copy of Dr. Chandler's initial test results accompanied by a letter informing Fortis that Mitchell was first diagnosed with HIV in May 2002—not 2001. *Id.* at 6a. The following week, Fortis responded that it would review his "appeal." *Id.* When the rescission committee reconvened, the information before the committee consisted of a single notation: "letter from attorney stating that the insured did not misrep[resent] coverage since the first diagnosis of AIDS was 5/14/2002." *Id.* The committee denied Mitchell's appeal and upheld the rescission. *Id.*

At trial, a medical expert testified that without medical treatment, Mitchell would contract AIDS within two years and likely die two years after that. *Id.* at 8a. A health care expert testified about the minimum expected costs that it would take to care for Mitchell throughout his life, not including complications from HIV and AIDS. An economist, based on the health care expert's figures, projected a total present value of $1,081,189.40 for Mitchell's treatment and costs. *Id.*

The jury returned a verdict in Mitchell's favor on the breach-of-contract claim and the bad-faith-rescission claim for $36,000 and $150,000, respectively. Between the two, Mitchell elected the

bad-faith remedy. The jury also awarded $15 million in punitive damages for the bad-faith claim. *Id.*

The trial court, in its post-judgment review, considered but rejected Fortis's argument that the punitive damages award violated due process.

On appeal, the South Carolina Supreme Court affirmed the jury's finding of liability on bad faith and affirmed the compensatory damages award. The Court held that it was "patently clear from the record that there is no support for Fortis's claim that 'the evidence as a whole is susceptible to only one reasonable inference' that Fortis was not liable for bad faith." *Id.* at 28a.

After engaging in *de novo* review and employing the three guideposts set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and the aggravating factors and ratio analysis discussed further in *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the court concluded that Fortis's misconduct "was reprehensible enough to merit an award towards the outer limits of the single-digit ratio" and remitted the $15 million punitive damages award to $10 million, resulting in a ratio of 9.2 to 1. *Id.* at 24a.

In arriving at this conclusion, the court recognized that Mitchell's harm was not only economic, but also physical because "the termination of his health insurance policy [ ] exposed him to great risk of physical danger." Pet. App. 18a. Moreover, Fortis exhibited a deliberate indifference to Mitchell's health and well-being, as its conduct would have "deprived Mitchell of health insurance for at least three years, during which time his health

would have surely deteriorated." *Id.* at 15a. It further found that Fortis's actions were motivated by greed—that is, the desire to boost its own profit by not having to support an HIV patient's costly medical treatment. *Id.* As Fortis knew, Mitchell was a young adult about to enter college, facing tremendous medical expenses, and was therefore financially vulnerable. *Id.* at 19a.

The court further concluded that the acts of deliberate indifference were repeated for more than two years. *Id.* The evidence supported a "finding that the harm Mitchell suffered was a result of intentional deceit." *Id.* In fact, it reflected corporate policy because Fortis had no written rescission policies, did not provide information about appeal rights or procedures, maintained a separate retention policy for rescission documents, appeared to doctor evidence by omitting the case manager's call from Stephens's phone log, and likely "was in possession of Dr. Shea's records as early as the summer of 2002." *Id.* at 19a-20a.

B. The Facts Misstated by Fortis in Its Petition

Fortis, in its petition, misstates key facts and omits others in a bid to draw into question the jury's finding of bad faith as it relates to the award of punitive damages, which Fortis claims is unconstitutionally excessive. For instance, Fortis asserts, "It was not until *after* Mitchell filed suit that Fortis learned that the date of the medical record was in error." Pet. 1 (emphasis added). As the South Carolina Supreme Court's review of the record, summarized above, demonstrates, Fortis had the

information readily available in its own files,[3] had ample means to confirm the correct date but chose not to undertake that task even though it had a duty to so, and refused to receive or examine documentation from Mitchell, his physicians, his health-care claims manager, or his attorney that would have enabled Fortis to determine the correct date. *See* Pet. App. 4a-6a, 19a. Instead, "Fortis reinstated Mitchell's policy nearly twenty months after it had been put on notice that the evidence upon which it relied was erroneous. " *Id.* at 19a.[4] In that intervening period of time, Fortis took steps to hide its misconduct and intentionally deceived Mitchell, in order to deny him coverage. *Id.* (describing evidence of Fortis's deceitful conduct). Fortis's bald assertion in its petition, then, that it

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[3] The trial court noted that, in addition to other indications that Fortis "acted unreasonably in rescinding the policy," an "inference may also be drawn that Fortis had the May 14, 2002 LabCorp report and Dr. Shea's medical records which definitively establish the diagnosis date as being in 2002, at the same time Fortis obtained the handwritten note on which it seeks to rely." Pet. App. 52a. In addition, and very telling, Fortis had no billing claims for diagnosis or treatment of HIV before May 14, 2002. *Id.*

[4] Even then, the policy was not really reinstated, as Mitchell learned when he tried to use it at a drugstore and learned that the policy benefits were not available to him. App. 18a (Order at 15). Mitchell remained at Hope Health for treatment because personnel there decided it would be best, especially because there was no assurance that Fortis would stand by their reinstatement. R. 660, 662.

was not aware of this so-called error until "after Mitchell filed suit" is at odds with the record.

Fortis also calls the rescission "temporary" because it eventually reinstated Mitchell's policy. That characterization is absurd. Fortis rebuffed all efforts to correct its error and had no appellate procedures. *Id.* It did not reinstate Mitchell's policy until "well after the litigation had begun." *Id.* at 6a n.4. Moreover, Fortis never considers any rescission final, permitting, without informing policyholders, repeated appeals. *Id.* at 53a & 53a n.2 (calling it a "never-ending appeal process."). Thus, it is able to characterize all rescissions as less than final. Yet, the trial court below found that Fortis intended for the rescission to be permanent. App. 6a (Order at 5) (finding that Fortis attempted to rescind the policy "in perpetuity"). The rescission was only "temporary" because Mitchell filed suit against Fortis, and even then the litigation continued for almost a year before Fortis reinstated the policy, leaving Mitchell, a financially vulnerable young adult, without health insurance, and placing his health in jeopardy at a time when he desperately needed medical care. *Id.* at 19a (finding that the "rescission committee decided to reject Mitchell's appeal even after his attorney contacted Fortis to emphasize that Mitchell had not misrepresented his condition at the time he applied for the policy").

Fortis also states that it was surprised that potential harm was considered by the South Carolina Supreme Court in its *de novo* review of the punitive damages and thus had no opportunity to submit evidence or argue that issue. Pet. 14. Yet, Fortis did not counter the evidence of potential harm that was

introduced, R. 238-40, asked for no limiting instruction after Mitchell in closing tied punitive damages to potential harm, R. 1532-33, and was well aware that the trial court relied on potential harm in its post-trial review. Pet. App. 35a, 47a-49a; App. 11a-12a (Order at 9) ("Plaintiff's potential harm from rescission of his policy includes much more than the loss of health insurance coverage for the $1,000,000 (One million dollars) present value estimate for treating HIV."). There was no surprise and ample basis for the South Carolina Supreme Court to rely on potential harm.

The South Carolina Supreme Court's decision to remit punitive damages, and its conclusion that the remitted award satisfies due process and "vindicate[s] the twin purposes of punishment and deterrence," was based on the fact that "Fortis willfully disregarded Mitchell's health and safety, and the jury so found in assessing punitive damages." Pet. App. 24a. The court itself acknowledged that, "[i]n assessing this remittitur, we place great emphasis upon" the reprehensibility of Fortis's conduct. Given the centrality of these facts to the questions sought to be presented for review, the only "post hoc rationalization[ ]" that merits "round[ ] condemn[ation]" (Pet. 18) are Fortis's factual misstatements, which are geared towards making its bad-faith conduct seem less reprehensible, or perhaps even excusable, so that this constitutionally reasonable award may somehow be made to appear excessive—which it is not.

REASONS FOR DENYING THE PETITION

The petition fails to satisfy any of the traditional bases for this Court's review. *See* Sup. Ct. R. 10. It massively revises the factual record of the case, rendering it a particularly poor vehicle for the exercise of this Court's discretion. It fails to present any important federal question on which the lower courts are in conflict, or about which they may be fairly said to be confused. This is true in regards to both questions presented: that is, (1) whether post-judgment consideration of potential harm during due process excessiveness review violates due process (a question that, in any event, is not properly presented by this case); and (2) whether the meticulous application of this Court's well-established punitive damages guideposts to the particular facts of this case was in error. Thus, the petition should be denied.

I. Petitioner's Denial of Facts Found by the Courts Below Fail to Advise This Court of the Full Depth of Its Misconduct and the Extent to Which Those Actions Were Compounded by Litigation Misconduct

Courts do not lightly conclude that particular acts of misconduct fall at the extreme end of the reprehensibility scale. If anything, members of the judiciary have seen a broad range of misconduct, civil and criminal, that makes them more likely to be blasé rather than shocked by new instances of egregious misconduct that may come before them. In colloquial language, they are likely to have "seen it all."

When the trial judge and a unanimous panel of the South Carolina Supreme Court conclude that the record reflects misconduct egregious enough to merit a significant punitive damages award, those courts' determinations should be credited as both earnestly made and reflective of the actual record. Judicial statements of the record ought to be treated as more credible than disparagements of losing parties, who conveniently elide over the parts of the record that are at odds with the fable they seek to concoct.

Yet, Fortis's statement of the case ignores the jury's determination of facts, the *de novo* review of the record rendered by the trial court judge who sat through the same presentation of the evidence as the jury, and the further *de novo* review of the South Carolina Supreme Court. Based on Fortis's version, one would question whether Fortis Insurance did anything wrong that might have merited liability, let alone punitive damages. Yet, the South Carolina Supreme Court found false both Fortis's continuing pleas that they engaged in a "'good act' of reinstatement following the 'temporary' rescission" and Fortis's repeated attempts to claim that "Mitchell himself acted negligently in failing to submit additional information prior to March 8, 2004." Pet. App. 26a. The trial court was similarly "struck by what a callous attitude Fortis exhibited toward the Plaintiff." *Id.* at 44a (noting also that "they investigated him for fraud because he contracted HIV"). Instead of displaying any remorse, Fortis treated its belated reinstatement at trial "as though it deserved to be applauded for a generous offer." *Id.* at 44a. It portrayed itself as a good corporate citizen in offering to pay past medical expenses, knowing that he did not accrue expenses at

the free clinic, but when faced with the value of those treatments denied any legal obligation to compensate Mitchell, leading the trial judge to observe that the "juxtaposition exemplifies Fortis's insincerity and failure to acknowledge the grave consequences of its misconduct." *Id.* at 44a-45a.

Fortis compounded its misconduct toward Mitchell by litigation misconduct. The trial judge found the record "replete with evidence of Fortis' desire for secrecy, concealment, shredded documents, deleted documents, missing entries on phone logs and recordings." *Id.* at 69a. The South Carolina Supreme Court found that such evidence was properly admitted. *Id.* at 26a.

Given that Fortis has not given an accurate account of the record, that the record reveals a company that resisted correcting error at the great expense of Mitchell's health, that it engaged in misconduct to avoid liability, that potential harm was presented to the jury, that Fortis requested no limiting instruction, that the trial judge considered potential harm and that Fortis assigned no error to that consideration, and that Fortis continues to act in denial of its misconduct, this Petition provides a poor vehicle for review of any conflicts that might exist over review of punitive damage awards and the award approved by the South Carolina Supreme Court should stand to serve its purpose of punishment and deterrence.

II. This Case Is Not a Suitable Vehicle for Considering Whether Post-Judgment Consideration of Potential Harm Violates Due Process

Fortis suggests that since *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1993) (plurality opinion), whether (or when) potential harm may be considered as part of due process excessiveness review, if not considered by the jury in awarding punitive damages, remains to be decided. Pet. 12. The statement overstates any open question and ignores this Court's recent guidance that potential harm is a permissible consideration as long as "the potential harm at issue was harm potentially caused the plaintiff." *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007).

Yet, even to the extent that a reviewing court's authority to consider potential harm may still be uncertain, this Petition is not a suitable vehicle for considering that question, for two reasons: first, the jury was presented with and considered the potential future medical expenses (*i.e.*, potential-harm evidence) that the courts below considered in reviewing the alleged excessiveness of the punitive damages; and second, Fortis did not press that issue nor did the South Carolina Supreme Court pass upon it below.

A. In this Case the Jury Was Presented with Evidence of Potential Harm, and It Considered Potential Harm in Assessing Punitive Damages

The first question in the Petition rests on an unsupported—and unsupportable—factual premise:

that the jury in this case was not presented with evidence of potential harm and did not consider this evidence in assessing punitive damages. Fortis argues that evidence of potential harm was introduced solely for purposes of establishing liability for bad faith, but not for actual and punitive damages. *See* Pet. 14. Specifically, it argues that evidence of potential future medical expenses, in the amount of the $1,081,189.40, was relevant only to motive, but not to punitive damages, and that it had no idea it was relevant to punitive damages or that the jury would consider it for that purpose. *See id.* This evidence, it claims, was first considered by the South Carolina Supreme Court in the course of remitting the award. The lack of meaningful notice that this evidence would be admitted and considered for this purpose, according to Fortis, violates procedural due process. These factual predicates are demonstrably false.

At trial, evidence of future medical expenses, in the amount of $1,081,189.40, was admitted, the trial court explained, "because it is probative of bad faith, as well as willfulness and recklessness." Pet. App. 62a; *see also id.* at 63a (finding that evidence of the value of claims that would have been submitted during the rescission period was properly admitted and was relevant to actual damages and "is also relevant to recklessness and willfulness"); *id.* at 64a (finding that "testimony from Dr. Htay about the deleterious effects to Plaintiff from receiving for his HIV . . . was relevant to both actual and punitive damages."). In South Carolina, the law has long recognized the propriety of awarding punitive damages for willful and reckless misconduct. *See Howard v. State Farm Mut. Auto. Ins. Co.*, 450

S.E.2d 582, 586 (S.C. 1994) (punitive damages recoverable if conduct is shown to be willful and reckless).

Here, the potential-harm figure was the product of testimony by an economist and a health expert concerning both the physical and economic harm likely to result from Fortis's successful rescission of Mitchell's insurance contract. Pet. App. 8a. The South Carolina Supreme Court, moreover, sustained these evidentiary rulings. *Id.* at 27a ("Evidence of the risk Mitchell faced without health insurance coverage is properly admissible to establish Fortis's reprehensibility and support an award for punitive damages.").

Accordingly, Fortis was well aware that evidence of potential future medical expenses was admitted as potential-harm evidence for purposes of calculating punitive damages. In fact, it objected during trial to the admission of such evidence; it objected post-judgment to its consideration on the theory that it was irrelevant for any purpose, *see* Pet. App. 64a (rejecting that argument and concluding it was relevant to both actual and punitive damages); and, on appeal to the state supreme court, it assigned error based on its admission, not solely because it was irrelevant (in its view) to bad-faith motive, but also because it was irrelevant (according to Fortis) to the calculation of actual and punitive damages. Fortis Final Br. 37, S.C. Sup. Ct. (No. 2003-CP-21-1347) ("Even if the evidence had some marginal relevance, given its highly speculative nature, the admission was erroneous because the prejudicial effect of inflaming the jury to award a large punitive award greatly outweighed any probative value.").

Fortis, which did not seek any limiting jury instruction for the consideration of that evidence for some purposes but not others, simply has no basis to say that the jury's award for punitive damages was not partially predicated on this evidence, particularly given that courts presume that juries consider all the evidence presented to them. *See Schlup v. Delo*, 513 U.S. 298, 329 (1995) ("It must be presumed that a reasonable juror would consider fairly all of the evidence presented.").

Contrary to Fortis's argument, this case, therefore, is not comparable to *Lankford v. Idaho*, 500 U.S. 110 (1991), in which a criminal defendant's due-process rights were violated because he had no notice that the trial judge was considering the death penalty at sentencing. *See* Pet. 16. Unlike *Lankford*, Fortis had meaningful notice and the adversarial process in this case worked properly, as evidenced by the fact that Fortis repeatedly objected to the admission of potential-harm evidence and cross-examined Mitchell's experts who testified about potential harm. Fortis, of course, knew that Mitchell was seeking punitive damages well before trial (the complaint noted this), and knew, based on this Court's punitive damages jurisprudence, that potential-harm evidence is admissible to demonstrate that such damages are warranted.

Mitchell specifically argued that punitive damages were available to take away Fortis's incentive to avoid paying $1.004 million in medical management costs, potential harms that Mitchell faced. R. 1532-33. Moreover, the trial court specifically considered various potential harms in evaluating whether the jury's verdict was excessive.

Pet. App. 47a-49a. Though the trial court analyzed the potential harm in terms of the $6 million lifetime value of the policy, it explicitly acknowledged that Fortis had engaged in bad faith "in an attempt to avoid costly medical treatment claims when facing the potential costs of a projected lifetime medical treatment plan of $1,080,000.00 and policy limits of $6,000,000.00." *Id.* at 51a. It did so to justify the size of the punitive damage award, which it held otherwise would not accomplish its legitimate purposes. Thus, given that the jury itself heard and considered this evidence in assessing punitive damages and that the trial court had specifically considered the same figure of potential harm in justifying the punitive damages, Fortis has no basis to claim that it lacked meaningful notice that the South Carolina Supreme Court would consider this same evidence during its post-judgment review.

B. This Issue Was Neither Pressed Nor Passed Upon Below

Fortis did not raise any procedural due process issue in its appeal to the South Carolina Supreme Court, and the court, understandably, did not pass on it. *See* Pet. App. 9a. The procedural history of this case makes plain that the lack-of-meaningful-notice issue could have and indeed should have been raised in the appeal to the South Carolina Supreme Court because potential harm was the basis of the trial court's approval of punitive damages. Because it was neither pressed nor passed below, this Court should decline to consider it in the first instance. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990).

Fortis argues that the South Carolina Supreme Court was the first court to consider potential-harm evidence as part of federal excessiveness review (*see* Pet. 9, 14), but that is not accurate. The trial court, in its post-judgment review, considered whether the punitive damages award was excessive in light of potential-harm evidence that the jury itself considered for that purpose, as discussed above. *See* Pet. App. 47a-48a. Fortis raised no issue concerning the trial court's treatment of that evidence, only a plenary challenge to the size of the jury's verdict.

Even if the jury had not been presented with and did not consider this evidence in assessing punitive damages, as Fortis incorrectly claims, the trial court plainly considered and relied upon this evidence in its federal excessiveness review. Fortis accordingly should have raised this lack-of-meaningful-notice issue in its appeal to the South Carolina Supreme Court. In other words, the "post hoc rationalizing" that Fortis claims violates procedural due process would have first occurred when the trial court, in denying Fortis's motion to remit the award, concluded that the award was not excessive in light of this evidence. It was the denial of that motion that Fortis appealed to the South Carolina Supreme Court, yet it did not assign error to the trial court's consideration of this evidence during federal excessiveness review.

To be clear, the trial court concluded that the award was not excessive based on evidence regarding the lifetime maximum payout under the policy—$6 million—which it considered to be the proper measure of potential harm. Pet. App. 48a, 51a; *see also id.* 21a. The South Carolina Supreme Court, by

contrast, decided to remit the award based on part of that same evidence, but only the part concerning the amount of potential future medical costs—$1,081,189.40—because it considered this figure to be the more appropriate measure of potential harm. *Id.* at 21a. Notably, both figures were based on same expert testimony about potential harm; indeed, the $6 million lifetime-maximum-payout figure includes what would have been potential future medical costs. *See id.* at 21a, 48a, 51a. Fortis therefore has no basis to argue that, prior to the South Carolina Supreme Court's disposition of the appeal, the $1,081,189.40 figure was "never before" considered as evidence of potential harm (Pet. 9), or as part of federal excessiveness review. *See id.* at 14 (claiming that "the South Carolina Supreme Court's reliance on the ratio between punitive damages and the $1,081,189.40 figure was a post hoc rationale of which Fortis lacked any meaningful notice.").[5]

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[5] While it is clear that Fortis had full and meaningful notice at the trial court level that the $1,081,189.40 figure was part of that court's potential-harm calculus, Fortis's argument that it should only have had to argue against the higher $6 million figure and not refute the lesser and included figure makes little sense. For reasons of judicial economy, appellate courts have long affirmed trial courts' judgments on different rationales than were employed below under the "right for the wrong reason" doctrine. *See Helvering v. Gowran*, 302 U.S. 238, 245 (1937). *See also Guthrie v. Lady Jane Collieries, Inc.*, 722 F.2d 1141, 1145 n.1 (3d Cir. 1983) ("An appellate court may affirm a result reached by the district court on different reasons, as long as the record supports the judgment.") (citations omitted). Fortis's claim that supplying a new rationale to affirm would violate due process would indicate that courts long

In sum, if in this case consideration of evidence supporting a quantitative estimate of potential harm, during post-judgment excessiveness review, is constitutionally improper, as Fortis now argues, then that error should have been assigned as part of the appeal to the South Carolina Supreme Court. But when Fortis appealed the trial court's denial of its motion to remit the award, it failed to argue that the trial court improperly considered potential-harm evidence in a way that was not presented to the jury, in violation of procedural due process. It is difficult to read Fortis's argument as anything other than feigning surprise to grasp at a due-process handle in order to excuse its own strategic decisions and procedural failures. Given this procedural history, this Court should adhere to its practice of "declin[ing] to review those issues neither pressed nor passed upon below." *FW/PBS, Inc.*, 493 U.S. at 224.

C. In Any Event, the Lower Courts Are Neither Conflicted Nor Confused Regarding What Impact, If Any, Post-Judgment Consideration of Potential Harm Evidence May Have on a Litigant's Due Process Right of Meaningful Notice

Contrary to Fortis's claims, the first question in the Petition is not an issue on which the lower courts are conflicted or confused. The two cases Fortis cites for the view that "courts have refused to consider potential harm in the analysis because that rationale was not placed before the jury" (Pet. 13) do not stand

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employing that venerable doctrine were acting unconstitutionally.

for that proposition. In *Security Title Agency, Inc. v. Pope*, 200 P.3d 977 (Ariz. Ct. App. 2008), the court refused to consider potential harm evidence that the jury itself considered and rejected. *Id.* at 1000. Clearly, then, the rationale at issue was in fact placed before the jury, and it was not considered by the court of appeals *because* the jury rejected it. *See id.* In *Goddard v. Farmers Insurance Co.*, 179 P.3d 645, 666 (Or. 2008), the court rejected the argument that the proper measure of potential harm was the amount plaintiffs had originally sought, because the jury, according to plaintiffs, could have awarded that amount. The reason the court in *Goddard* rejected this argument is not, as Fortis maintains, because the rationale was not placed before the jury (Pet. 12 n.4); the court rejected this argument because the rationale (or evidence) for awarding $100 million in punitive damages was put before the jury and rejected by it when it awarded a lesser amount. 179 P.3d at 666.

In addition, the three cases Fortis has identified for the proposition that courts are "invok[ing] potential harm even when the plaintiff did not invoke that rationale at trial and the jury was not instructed to consider it" cannot be fairly characterized as Fortis does. *See* Pet. 13 n.5 (citing *Tronzo v. Biomet, Inc.*, 236 F.3d 1342 (Fed. Cir.), *cert. denied*, 534 U.S. 1035 (2001), *In re New Orleans Train Car Leakage Fire Litigation*, 795 So. 2d 364, 384 (La. Ct. App. 2001), and *Bennett v. Reynolds*, 242 S.W.3d 866 (Tex. Ct. App. 2007, *pet. granted*)). Each case receives a single sentence of explication in a parenthetical, but none is accurately characterized. For instance, in *Tronzo*, the court did not reinstate a punitive damages award, as Fortis suggests, because

of potential-harm evidence that was not presented to the jury for that purpose. *See* Pet. 13 n.5. The court reinstated the award because the defendant had waived any due process objection to the size of the award by not raising it in the first appeal. 236 F.3d at 1349-50. Accordingly, the court concluded that the district court should not have remitted the award on due process grounds when the case was remanded to it. *Id.* at 1350.

Next, in citing *In re New Orleans*, Fortis appears to argue that the court in that case read this Court's decision in *TXO* to permit the post-judgment invocation of a rationale that was not presented to the jury. That is not what the court said. *See* 795 So. 2d at 384. The court there recognized that both *TXO* and *BMW* indicate that courts can consider the potential harm likely to have been caused to a plaintiff, in the course of due process excessiveness review. *Id.* The court then noted that in *TXO* there was no specific jury finding respecting the amount of potential harm, thus suggesting that it, too, could consider potential-harm evidence in the absence of a specific jury finding. *See id.* Nevertheless, that statement, which Fortis quotes (*see* Pet. 13 n.5) does not indicate that the rationale itself, or evidence of potential harm, was never presented to, or considered by, the jury in that case.

Lastly, Fortis cites *Bennett v. Reynolds* as an example in which a court took account of potential harm in its excessiveness review even though the jury never specifically found such harm. But consideration of potential harm was unobjectionable, the court explained, because in that case "Bennett admitted that such damages from being wrongfully

accused of cattle theft would be substantial." 242 S.W.3d at 905. Thus, nothing in *Bennett* indicates that the parties lacked meaningful notice that potential harm could (or would) be considered. *See id.* at 906 ("Bennett's testimony is significant as it bears on the notice concerns that are the ultimate focus of our due process analysis.").

In sum, these cases, properly understood, reveal that the lower courts are neither conflicted nor confused about when potential-harm evidence may be considered on appeal in the course of excessiveness review. This Court's review, accordingly, is unwarranted.

III. There Is No Reason to Revisit Standards for Due Process Excessiveness Review, Which Lower Courts, Including the Court Below, Are Faithfully and Properly Applying

Fortis, in its second question presented, urges this Court to revisit its punitive damages jurisprudence because, in its view, lower courts remain confused about how to conduct federal excessiveness review. The unanimous decision of the South Carolina Supreme Court is emblematic of that confusion, according to Fortis, as all five justices made "fundamental errors with regard to each guidepost" (Pet. 19) in the course of remitting the punitive damages award at issue here. To the contrary, the court below, in a lengthy and considered decision, correctly applied this Courts' well- (and much-) elaborated punitive damages jurisprudence to the particular facts of this case, painstakingly going through each guidepost and aggravating factor. The court remitted the award to

an amount that "adequately vindicate[s] the twin purposes of punishment and deterrence that support the imposition of punitive damages," placing "great emphasis" on the fact that the jury found that "Fortis willfully disregarded Mitchell's health and safety." Pet. App. 24a. It properly stated this Court's standards for federal excessiveness review and committed no error in their application. Nonetheless, even if it had misapplied a properly stated rule of law, as Fortis claims, that is not a "compelling" reason for granting certiorari. *See* Sup. Ct. R. 10. For this reason, Fortis's second question presented—that the "South Carolina Supreme Court's [a]pplication [o]f [t]he BMW [g]uideposts [w]arrants [r]eview," Pet. 18—fails to present a certworthy issue for this Court's consideration.

What is more, the lower courts are not in need of further guidance from this Court as to how to conduct federal excessiveness review that accounts both for the "elementary notions of fairness," *BMW*, 517 U.S. at 574, and for the rationale for imposing punitive damages in the first place—punishment and deterrence, *id.* at 568. This Court's due-process jurisprudence relating to punitive damages, which is already robust and clear, and this Court's own application of these guideposts to specific facts in multiple cases, provide ample guidance. Given the absence of any real or legitimate confusion in their application, this Court's review is unnecessary.

A. Certiorari Is Not Warranted to Reconsider and Radically Rework the Reprehensibility Guidepost

This Court has repeatedly stated that the three guideposts are independent markers of

reasonableness and that, of the three, "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419 (quoting *BMW*, 517 U.S., at 575). And it has provided additional, aggravating factors for consideration to determine whether conduct is highly reprehensible, indicating that the greater the number of factors implicated, the more reprehensible the conduct. *Id.* Fortis claims that courts are treating these factors "robotically" as "checklists," and that this Court should grant review in order to instruct them not to adhere "rigidly" to these factors in assessing whether an award is reasonable.[6] Surely a harm that is physical, that displays a reckless disregard for health, that is aimed at a financially vulnerable person, that is repeated, and that is the product of deceit—as was the case here—is more blameworthy than conduct that is not, and is more likely "to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.* (citing *BMW*, 517 U.S. at 575). There is nothing "rigid" in so concluding. If anything, careful consideration of each factor provides notice of the type of conduct that may be deemed highly reprehensible, and lends a measure of consistency to the analysis; inviting less rigid consideration of these factors would work against these goals.

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[6] Ironically, at the same time Fortis attacks lower courts for "often" applying the *BMW* guideposts "mechanically," Pet. 19, it argues in favor of a mechanical application of a 1:1 ratio without consideration of this Court's teachings that some wrongs are more blameworthy than others. *BMW*, 517 U.S. at 575.

Fortis also asks this Court to reconsider reprehensibility's status as the "most important indicium" of reasonableness and proposes that the reprehensibility and comparability guideposts be conflated. This Court should abandon its current framework, Fortis argues, because lower courts, in applying the factors, are "los[ing] sight of the forest for the trees." Pet. 21. But its proposal would only detract from the historic centrality of reprehensibility in the due-process calculus, which is central precisely because of its big-picture focus: reprehensibility is the best gauge of reasonableness, this Court has repeatedly concluded, and a reasonable award is one that advances the twin purposes of punishment and deterrence. *See State Farm*, 538 U.S. at 575. This conclusion is sound and need not be revisited.

Fortis also urges this Court to jettison its current framework because, in its view, even if the harm at issue in a particular case satisfies all of the non-exclusive reprehensibility factors, it may not be highly reprehensible if others are also engaging in similar harmful acts. *See* Pet. 19. To account for this so-called concern, Fortis invites the Court to conflate reprehensibility and comparability. This move is "critical[]", Fortis maintains, because "all punishable conduct is reprehensible to some degree." Pet. 19 (emphasis removed).

There is no good reason for this Court to accept Fortis's invitation. The benefits of considering and comparing similar instances in which penalties are assessed are already derived by the application of the independent comparability guidepost. It would otherwise be inappropriate to import this analysis

into the reprehensibility guidepost because Fortis's proposed inquiry—how reprehensible is this conduct if everyone else is doing it?—would excuse reprehensible conduct solely on the basis of its pervasiveness and encourage a race to the bottom. The act of repeatedly and maliciously placing an individual's health in jeopardy in an effort to maximize profit is no less reprehensible because others are similarly greedy. This sort of grade-school excuse does not illuminate federal excessiveness review, and certainly it is not preferable to the sound and well-established framework that this Court has set out. If anything, this proposed analysis would sow confusion by requiring mini-trials in which juries hear evidence concerning the conduct of others in order to determine whether other instances of reprehensible conduct may be comparable to the case squarely before them. It would raise profound due-process issues for a plaintiff to have to investigate and rebut claims of bad conduct by non-parties to the litigation in order to demonstrate that the misconduct aimed at him was truly reprehensible. *Cf. Philip Morris*, 127 S. Ct. at 1063 (stating that similar use of harm to nonparties would add a "a near standardless dimension to the punitive damages equation."). Fortis's suggestion to rework the reprehensibility guidepost in this manner deserves no further consideration.

B. Certiorari Is Not Warranted to Consider Whether to Adopt a 1-to-1 Ratio of Compensatory to Punitive Damages

Fortis also requests certiorari so that this Court may clarify its statement that in cases in which compensatory damages are substantial, a 1-to-1 ratio

of compensatory to punitive damages may mark "the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425. It thus imagines a conflict between cases in which the ratio is 1-to-1, and any other case in which the ratio is not—without any attention to the particular facts of these cases, including whether specific compensatory awards were substantial. *See* Pet. 27.

In making that claim, Fortis attempts to manufacture a mathematical bright-line strait-jacket out of precedential cloth that this Court has repeatedly, categorically, and wisely declared cannot be woven together—and so states in the very case Fortis asserts held otherwise. *See State Farm*, 538 U.S. at 424-25 ("We have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed.") (citations omitted). *See also BMW*, 517 U.S. at 582 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula"); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable.").

In fact, the same paragraph in *State Farm* that suggested a single-digit ratio was "perhaps" appropriate when the compensatory award was "substantial" reiterated that "there are no rigid benchmarks that a punitive damages award may not surpass" and that "[t]he precise award in any case, of course, must be based upon the facts and

circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm*, 538 U.S. at 425.

Given that there is no constitutionally mandated ratio, and that determination of punitive damages is a fact-intensive inquiry, *see id.* at 425, no conflict can exist simply by virtue of different outcomes. Nor is it significant that some courts may find a single-digit ratio to be constitutionally valid under the particular set of facts before them. *See* Pet. 27 n.15. Instead, courts are doing what courts are supposed to do: evaluating the record *de novo* and determining what punitive award properly accomplishes the State's legitimate interest in punishment and deterrence.

C. Certiorari Is Not Warranted to Reconsider the Comparability Guidepost

Courts do consider the comparability guidepost, *see* Pet. 28-29 nn.16-17 (collecting cases in which the comparability guidepost is considered), and their application of that guidepost is consistent with this Court's precedents. Fortis acknowledges that the South Carolina Supreme Court considered this guidepost in its analysis, but claims that the decision below exemplifies a trend: some courts are "refusing to treat the existence of a low fine as an indication that a high punitive award is excessive," while others are remitting awards based on a comparison of the award and a civil or criminal penalty. *Id.* at 29. There is no such problematic trend or conflicting treatment.

Fortis's insistence that it has discovered a conflict in the treatment of the comparability guidepost is predicated on a misunderstanding of that guidepost: that is, punitive damages awards, according to

Fortis, must be remitted in each and every case based on comparable civil or criminal penalties. That understanding of the law is plainly incorrect, because it would render the comparability guidepost the ne plus ultra consideration of federal excessiveness review—which it is not (*see State Farm*, 538 U.S. at 419); and because it would render consideration of the first two guideposts a futile exercise in many, if not most, cases.

Fortis fails to establish a conflict for a separate reason: it imagines a conflict between cases in which awards are remitted in view of civil or criminal penalties, and any other case in which civil or criminal penalties are not outcome determinative—without any attention to the particular facts of these cases, including whether the other guideposts outweighed the third in a particular case. *See* Pet. 27. If anything, the cases Fortis cites demonstrate that courts are properly factoring the comparability guidepost into their federal excessiveness review and treating it as one of three considerations. *See id.* nn.16-17.

That is true as well of the decision below, which carefully considered civil penalties assessed in other cases in South Carolina and, in accordance with those penalties, remitted the award, thereby bringing it in line with other comparable instances of highly reprehensible conduct. Indeed, the South Carolina Supreme Court's consideration of comparability is plainly separate from its proportionality analysis (*see* Pet. App. 22a-24a), contrary to Fortis's suggestion (Pet. 31), and thus the court below properly considered and accorded each factor due weight. For these reasons, review of the

application of the comparability guidepost in this case is unwarranted.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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Respectfully submitted,

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